SUPREME COURT U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner,*

v.

DONN DUNCAN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

KENNETH S. NUNNELLEY
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
Telephone: (386) 238-4990
Fax: (386) 226-0457

COUNSEL FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether the Florida Supreme Court acted contrary to this Court's decisions in *Strickland v. Washington,* 466 U.S. 668 (1984), and *Yarborough v. Gentry*, 540 U.S. 1 (2003), and in a manner that is in conflict with decisions of the United States Courts of Appeal and other State courts, when it held that counsel, who was unable to remember specific reasons for his trial decisions, was constitutionally ineffective?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATION TO OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 11

THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT, WITH DECISIONS OF UNITED STATES COURTS OF APPEAL, AND WITH THE DECISIONS OF OTHER STATE COURTS. 11

CONCLUSION 15

CERTIFICATE OF SERVICE 15

APPENDIX ..... A1 - A39

TABLE OF AUTHORITIES
CASES

Asay v. State,
769 So. 2d 974 9

Chandler v. United States,
218 F.3d 1305 (11th Cir. 2000) 12, 14

Dufour v. State,
2005 WL 851026 (Fla., Apr. 14, 2005) 13

Duncan v. State,
619 So. 2d 279 (Fla. 1993) 6

Engle v. Isaac,
456 U.S. 107 (1982) 11

Florida v. Nixon,
125 S. Ct. 551 (2004) 13

Garlotte v. Fordice,
515 U.S. 39 (1995) 14

Hardwick v. Crosby,
320 F.3d 1127 (11th Cir. 2003) 14

Johnson v. Alabama,
256 F.3d 1156 (11th Cir. 2001) 14

Johnson v. State,
2005 WL 729169 (Fla., Mar. 31, 2005) 13

Johnson v. State,
2005 WL 729182 (Fla., Mar. 31, 2005) 13

Kimmelman v. Morrison,
477 U.S. 365 (1986) 12

Massaro v. United States,
538 U.S. 500 (2003) 12

Montgomery v. State,
2004 Ala. Crim. App. LEXIS 160
(Ala. Crim. App., Aug. 27, 2004) 14

Putman v. Head,
268 F.3d 1223 (11th Cir. 2001) 14

Romero v. Lynaugh,
884 F.2d 871 (5th Cir. 1989) 12

Romine v. Head,
253 F.3d 1349 (11th Cir. 2001) 13, 14

Rose v. State,
675 So. 2d 567 (Fla. 1996) 8

Sallahdin v. Mullin,
380 F.3d 1242 (10th Cir. 2004) 12

State v. Caskey,
690 N.W.2d 26 (Wisc. 2004) 12

State v. Duncan,
894 So. 2d 817 (Fla.2004) 1, 7, 12

Strickland v. Washington,
466 U.S. 668 (1984) ..... passim

Van Poyck v. Florida Department of Corrections,
290 F.3d 1318 (11th Cir. 2002) 14

Weeks v. State,
894 S.W.2d 390 (Tex. App. 1994) 12

White v. Singletary,
972 F.2d 1218 (11th Cir. 1992) 14

Williams v. Head,
185 F.3d 1223 (11th Cir. 1999) 12

Wilson v. Henry,
185 F.3d 986 (9th Cir. 1999) 12

Yarborough v. Gentry,
540 U.S. 1 (2003) ..... i, 12, 13

STATUTES

28 U.S.C. § 1257(a) 1

MISCELLANEOUS

Florida Rule of Criminal Procedure 3.851 6

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner,*

v.

DONN DUNCAN, *Respondent.*

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as *State v. Duncan,* 894 So. 2d 817 (Fla. 2004).

Petitioner's Appendix contains the opinion of the Florida Supreme Court in *State v. Duncan, supra* (A1-A28). Petitioner's Appendix also includes the previous opinion of the Florida Supreme Court affirming Duncan's conviction and death sentence, which is reported at *Duncan v. State*, 619 So. 2d 279 (Fla. 1993) (A29-A39).

JURISDICTION

The decision below was entered on November 24, 2004. The State's motion for rehearing was denied on February 11, 2005, and that Court issued its mandate on February 28, 2005. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Amendments to the Constitution of the United States are involved:

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Sixth Amendment is applicable to the States through the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On direct appeal from his conviction and sentence of death, the Florida Supreme Court summarized the facts of Duncan's offense in the following way:

On the morning of December 29, 1990, Donn A. Duncan murdered his fiancee, Deborah Bauer. At the time of the murder, Duncan was living with Deborah Bauer, Deborah's daughter, Carrieanne Bauer, and her mother, Antoinette Blakeley. During the evening hours of December 28, 1990, Deborah left the house apparently to go drinking. Duncan left a short time later. When Duncan returned home around 8:30 p.m., he told Antoinette that Deborah would not be home until later because she had gone off with a guy who was going to buy her beer because Duncan had refused to do so. Duncan also told Antoinette to ask Deborah to sleep on the couch because he did not want to argue with her and that he would be leaving in the morning. Duncan then went into the bedroom, where he remained until the next morning.

When Deborah returned around 10:30 p.m., her mother told her not to go into the bedroom because Duncan did not want to be bothered. A short time later Deborah went into the bedroom to get some cigarettes but left the room after a couple of minutes. Neither Antoinette nor Carrieanne heard any arguing or fighting while Deborah was in the room. Deborah slept in the living room with her mother and daughter, neither of whom was aware of any further contact between Duncan and Deborah during the night.

The next morning, Deborah went outside to smoke a cigarette. While Deborah was on the front porch, Duncan got up. Antoinette told him "there is the door," indicating that he should

leave. After he and Antoinette exchanged words, Duncan put on a jacket and walked out on the porch where Deborah was sitting, smoking a cigarette. Duncan stood behind Deborah for a few seconds and then stabbed her multiple times with a kitchen knife he had hidden in his jacket. When Carrieanne responded to her mother's screams, Duncan approached Carrieanne with the knife and asked, "You want it too?" Believing Duncan would stab her too, Carrieanne ran and hid in the closet.

When Antoinette asked a neighbor who had witnessed the attack to call 911 because her daughter had been stabbed, Duncan said, "Yeah, I did it on purpose. I'll sit here and wait for the cops." Duncan, who had thrown the knife on the ground, then waited until police arrived. Upon their arrival, Duncan told police, "I stabbed her." After being advised of his rights, Duncan told police that he and the victim had been arguing and that he remembered going outside and stabbing her twice. In a signed statement, Duncan wrote:

> I walked out the door with the knife and stabbed Debbie as she was sitting on the stoop. I think I stabbed her twice. I saw her go off with two guys last night she came home about 1:00 a.m. and I guess I went nuts.

Deborah Bauer died two hours after the attack. The cause of death was a stab wound to the right

chest. According to the medical examiner, the victim also had suffered two life threatening wounds to the back and three defensive wounds, one to each arm and one to her leg.

Duncan was charged with and convicted of the first-degree murder of Deborah Bauer and aggravated assault on Carrieanne Bauer. He was sentenced to three and one-half years' imprisonment on the aggravated assault. In accordance with the jury's twelve-to-zero recommendation of death, the trial judge sentenced Duncan to death for the first-degree murder.

In aggravation, the trial court found that Duncan had previously been convicted of a felony involving the use or threat of violence -- the aggravated assault on Carrieanne and the second-degree murder of a fellow inmate in 1969. In mitigation, the trial court considered the following fifteen mitigating factors urged by the defendant: 1) Duncan's childhood and upbringing saddled him with an emotional handicap; 2) Duncan's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime; 3) Duncan was under the influence of extreme mental or emotional disturbance at the time of the killing; 4) the defendant was under the influence of alcohol at the time of the killing; 5) the killing was not for financial gain; 6) the killing did not create a great risk of death to many persons; 7) the killing did not occur while Duncan was committing another crime; 8) the victim was not

> a stranger; 9) the victim was not a child; 10) Duncan was a good, dependable, and capable employee; 11) Duncan was a good listener and supportive friend; 12) Duncan had satisfactorily completed his parole and was discharged from parole; 13) Duncan confessed to the killing; 14) the killing came as a result of and subsequent to a domestic dispute; 15) Deborah Bauer chose Donn Duncan to be her husband.

Duncan v. State, 619 So. 2d 279, 280-281 (Fla. 1993).

Duncan filed a *Florida Rule of Criminal Procedure* 3.851 motion which alleged, *inter alia*, that he had not received constitutionally effective assistance of counsel during the penalty phase of his capital trial. The Florida Supreme Court framed that issue in the following way:

> [The collateral proceeding trial court found that] only Duncan's claim that counsel was ineffective for failing to introduce available mental health mitigation that could have led the jury to recommend a life sentence was meritorious. Specifically, the trial court concluded that based upon the testimony provided by Dr. Berland, Duncan's mental health expert, during the evidentiary hearing, "counsel knew or should have known of the existence of various mitigating factors that could have been presented during the penalty phase. The onus is therefore on the State to demonstrate that counsel had a valid strategic or tactical basis for declining to present those factors." Order Granting in Part and Denying in Part Fifth Amended Motion to Vacate Judgments of Conviction and Sentences at 16.

> Noting that Duncan's penalty phase trial counsel was not able to provide a **specific** reason as to why Dr. Berland was not called to testify, the trial court ruled that both the performance prong and prejudice prong of the *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] test for ineffective assistance of counsel were satisfied. Therefore, the trial court held that Duncan was entitled to a new penalty phase proceeding.

State v. Duncan, 894 So. 2d at 822.

The Florida Supreme Court stated:

> After evaluating the postconviction evidentiary hearing testimony provided by Dr. Berland, the mental health expert presented by Duncan, the circuit court, in its order, wrote:
>
> > Based on Dr. Berland's testimony, the Court finds that counsel knew or should have known of the existence of various mitigating factors that could have been presented during the penalty phase. *The onus is therefore on the State to demonstrate that counsel had a valid strategic or tactical basis for declining to present those factors.*
>
> Order Granting in Part and Denying in Part Fifth Amended Motion to Vacate Judgments of Conviction and Sentences at 16 (emphasis added). The lower court further wrote:

> Simply asserting that something was done for unknown strategic reasons is not sufficient. An evidentiary hearing is held so that the Court may hear what the actual reason was, and may then determine whether that reason is consistent with professional standards. In the absence of a specific reason, the Court is constrained to find that the [sic] Mr. Duncan's allegation has satisfied the performance prong of *Strickland.*

Id. at 18. While the United States Supreme Court has unquestionably determined that the burden of persuasion is on the defendant to demonstrate ineffective assistance, *see Strickland,* 466 U.S. at 689, 104 S.Ct. 2052, we have held that "[t]he failure to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." *Rose v. State,* 675 So. 2d 567, 571 (Fla. 1996).

Id., at 823-24. (Italics in original).

The Florida Supreme Court went on to state:

> If the trial court's order was understood as holding that Duncan is entitled to relief *solely* because his former attorney was unable to provide the court with a reason for his failure to call Dr. Berland to testify, then such a holding would be in error, as it would constitute improper

burden shifting. Ineffective assistance of counsel is not proven, *per se*, merely because the attorney whose acts are being questioned cannot provide a justification for his actions. The United States Supreme Court has held, and we have recognized, that the burden is on the moving party to demonstrate that the two components of *Strickland,* namely that the acts or omissions of the lawyer were outside the broad range of reasonably competent performance and that the substantial deficiency so affected the proceeding that confidence in the outcome is undermined, have been satisfied. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052; *Asay,* 769 So. 2d at 984. Once the moving party has made the required showing, an objective basis for counsel's actions must be found, within the record, to justify counsel's performance and thereby rebut the moving party's claim. If the record itself does not provide such justification, then the court has no choice but to require the State, and the attorney whose performance is in question, to answer the moving party's allegations.

In the instant action, the trial court did not improperly shift the burden to the State to prove counsel was effective. A review of the court's order demonstrates that the trial court followed the proper procedure in determining that a new penalty phase is warranted. Initially, the court considered the evidence presented by Duncan, and determined that Duncan had satisfied the demands of *Strickland.* Next, the court reviewed the record and held that the record, which included the testimony of Duncan's former

> attorney, did not provide the requisite justification for the attorney's performance, and therefore Duncan was entitled to a new penalty phase. Having reviewed the record and considered both parties' arguments on appeal, we hold that Duncan did satisfy the requirements of *Strickland,* and the record does not provide an objective basis to justify counsel's actions, and therefore the trial court properly granted Duncan a new penalty phase.

Id., at 824.

The Florida Supreme Court concluded its discussion by stating:

> Despite the trial court's statement, in its order, that "the Court can conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify," Order Granting in Part and Denying in Part Fifth Amended Motion to Vacate Judgments of Conviction and Sentences at 18, it is clear to us that the record is completely devoid of any justification for counsel's failure to present the available evidence. The trial court did not provide what it believed to be the "sound strategic and tactical reasons for deciding not to call Dr. Berland," nor can we ascertain from this record what those reasons may have been. When questioned during oral argument, the State's attorney could also not provide this Court with any such reasons. We again emphasize that our holding is not based solely upon Duncan's former attorney's failure to provide a justification for his actions. Instead, it is the complete absence in the

> record before us of any reason to support why the doctor was not called to testify on Duncan's behalf. Duncan, having satisfied his burden under *Strickland,* is entitled to a new penalty phase.

Id., at 826.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT, WITH DECISIONS OF UNITED STATES COURTS OF APPEAL, AND WITH THE DECISIONS OF OTHER STATE COURTS.

The Florida Supreme Court's decision turned the presumption of competence contained in *Strickland* on its head and replaced it with a presumption of incompetence when trial counsel was unable to remember specific reasons for his decision not to call a mental health expert at the penalty phase of Duncan's capital trial.[1] Under *Strickland*, courts deciding an ineffectiveness claim must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington,* 466 U.S. 668, 689-90 (1984). If the record is incomplete or unclear about counsel's actions, the

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[1] In *Engle v. Isaac,* 456 U.S. 107, 133-34 (1982), this Court stated, "[c]ounsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense." That decision is consistent with *Strickland* (which came two years later) in recognizing that counsel is presumed competent. The Florida Supreme Court's result in this case conflicts with *Engle*.

presumption is that counsel did what he should have done and that he exercised reasonable professional judgment. *See, Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999). Counsel's competence is presumed, *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986), and, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1 (2003) (presumption of competence is controlling even when the reviewing court has "no way of knowing whether a seemingly unusual or misguided action by counsel has a sound strategic motive."); *Massaro v. United States,* 538 U.S. 500, 505 (2003). *Accord, Sallahdin v. Mullin*, 380 F.3d 1242 (10th Cir. 2004); *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000); *State v. Caskey*, 690 N.W.2d 26 (Wisc. 2004); *Wilson v. Henry*, 185 F.3d 986 (9th Cir. 1999); *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001); *Romero v. Lynaugh,* 884 F.2d 871, 878 (5th Cir. 1989) ("At that hearing [trial counsel], while unable to recall all the reasons for his actions taken some two years earlier, explained his reasons in general terms, . . . "); *Weeks v. State,* 894 S.W.2d 390 (Tex. App. 1994).

The Florida Supreme Court altered the strong presumption of competence contained in *Strickland* by holding that when the defendant "satisfies [his] burden of identifying particular omissions made by his penalty phase counsel that were outside the broad range of reasonably competent performance," it is "then the State's obligation to demonstrate, either through the trial record or the testimony of Duncan's trial counsel, a reasonable, objective justification for counsel's failure to present the available evidence of mental health mitigation." *State v. Duncan*, 894 So. 2d at 825-26. That newly-created analysis does away with the presumption of competence, and creates a *de facto* presumption of incompetence which squarely conflicts with

Yarborough v. Gentry.[2] Assuming for the sake of argument that the record provides no "justification" for trial counsel's decision not to call Dr. Berland as a penalty phase witness, the presumption of competence established in *Strickland* (and repeated in *Yarborough*, which is functionally identical to this case) forecloses relief.[3] This Court should exercise its discretionary jurisdiction to correct the conflict that the Florida Supreme Court created when it decided this case inconsistently with the precedents of this Court, as well as inconsistently with the Federal Courts of Appeal and other State courts.

In addition to being contrary to *Yarbrough* and *Strickland*, the Florida Supreme Court's decision conflicts with various Federal Courts of Appeal, and with various State courts. For example, the Eleventh Circuit has held (in the same context) that when "the evidence does not clearly explain what happened, or more accurately why something failed to happen, the party with the burden loses." *Romine v. Head*, 253 F.3d 1349, 1357-58 (11th Cir. 2001) (emphasis added);[4] *Putman v. Head*, 268 F.3d

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[2] The Florida Supreme Court has heretofore followed *Strickland*, and has, in recent decisions, discussed the proper standard at length. *Dufour v. State*, 2005 WL 851026 (Fla., Apr. 14, 2005); *Johnson v. State*, 2005 WL 729182 (Fla., Mar. 31, 2005); *Johnson v. State*, 2005 WL 729169 (Fla., Mar. 31, 2005). However, in this case, as in *Florida v. Nixon*, 125 S. Ct. 551 (2004), the Florida Supreme Court has gotten off the mark to the detriment of the State.

[3] The true facts are that trial counsel testified that he did not call Dr. Berland because his testimony would have been harmful. However, the Florida Supreme Court decided the case as if counsel gave no reason at all for his decision. This makes no difference here -- there is a square conflict between the Florida Supreme Court and this Court.

[4] The issue in *Romine* was functionally identical to the issue in this case:

1223, 1246 (11th Cir. 2001) (same); *Accord, Garlotte v. Fordice*, 515 U.S. 39, 46-7 (1995); *Hardwick v. Crosby*, 320 F.3d 1127, 1161 (11th Cir. 2003); *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001); *Chandler v. United States*, 218 F.3d 1305, 1327 (11th Cir. 2000); *Van Poyck v. Florida Dept. of Corrections*, 290 F.3d 1318, 1322-23 (11th Cir. 2002); *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir. 1992); *Montgomery v. State*, 2004 Ala. Crim App. LEXIS 160 (Ala. Crim. App., Aug. 27, 2004). The Florida Supreme Court's new ineffectiveness standard conflicts with that settled principle, and results in a "standard" that is inconsistent with binding precedent from this Court. While claiming that the burden of proof is not shifted to the State, the *Duncan* Court's decision says otherwise -- the Florida Supreme Court did away with the *Strickland* presumption of competence and granted relief on Constitutional grounds. That result is contrary to *Strickland* and the cases following it, and this Court should exercise its discretionary jurisdiction to correct that conflict.

> The problem is that by the time [trial counsel] was asked about the matter in the state habeas hearing, a decade had passed and he could no longer remember his reasoning about not using Mrs. Romine's prior convictions to impeach her. But the placement of burdens in a federal habeas proceeding means that the effect of that problem falls on Romine [the petitioner]. A petitioner has the burden of establishing his right to federal habeas relief and of proving all facts necessary to show a constitutional violation.

Romine v. Head, 253 F.3d at 1357.

CONCLUSION

WHEREFORE, based upon the foregoing, the State respectfully requests this Court to grant the petition for writ of certiorari and summarily reverse the judgment of the Florida Supreme Court.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

KENNETH S. NUNNELLEY
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

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APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

KENNETH S. NUNNELLEY
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
Telephone: (386) 238-4990
Fax: (386) 226-0457

COUNSEL FOR PETITIONER

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Index to Appendix

State v. Duncan,
Florida Supreme Court Case Nos. SC02-636 & SC03-145,
November 24, 2004 ..... A-1 through A-28

Duncan v. State,
Florida Supreme Court Case No.
April 29, 1993 ..... A-29 through A-39

STATE OF FLORIDA, Appellant/Cross-Appellee,

vs.

DONN A. DUNCAN, Appellee/Cross-Appellant.

DONN DUNCAN, Petitioner,

vs.

JAMES V. CROSBY, JR., etc., Respondent.

Nos. SC02-636 & SC03-145

Supreme Court of Florida

November 24, 2004

Rehearing Denied Feb. 11, 2005.

PER CURIAM.

The State of Florida appeals an order of the circuit court granting in part and denying in part a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Duncan cross-appeals and petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const.

FACTS AND PROCEDURAL HISTORY

Donn Duncan was adjudicated guilty of the 1990 murder of Deborah Bauer. See *Duncan v. State*, 619 So. 2d 279, 280 (Fla.

1993).[1] The jury, by a vote of twelve to zero, recommended the death penalty, and, following that recommendation, the trial court imposed a sentence of death. See id. at 281. On direct appeal, this Court upheld Duncan's conviction and sentence. See id. at 284. The facts surrounding the murder of Deborah Bauer were ably detailed in our opinion on direct appeal:

> On the morning of December 29, 1990, Donn A. Duncan murdered his fiancee, Deborah Bauer. At the time of the murder, Duncan was living with Deborah Bauer, Deborah's daughter, Carrieanne Bauer, and her mother, Antoinette Blakeley. During the evening hours of December 28, 1990, Deborah left the house apparently to go drinking. Duncan left a short time later. When Duncan returned home around 8:30 p.m., he told Antoinette that Deborah would not be home until later because she had gone off with a guy who was going to buy her beer because Duncan had refused to do so. Duncan also told Antoinette to ask Deborah to sleep on the couch because he did not want to argue with her and that he would be leaving in the morning. Duncan then went into the bedroom, where he remained until the next morning.

---

[1] Duncan was also charged with and convicted of the aggravated assault of Bauer's daughter, Carrieanne Bauer. He was sentenced to three and one-half years' imprisonment on the aggravated assault conviction. See *Duncan*, 619 So. 2d at 281.

When Deborah returned around 10:30 p.m., her mother told her not to go into the bedroom because Duncan did not want to be bothered. A short time later Deborah went into the bedroom to get some cigarettes but left the room after a couple of minutes. Neither Antoinette nor Carrieanne heard any arguing or fighting while Deborah was in the room. Deborah slept in the living room with her mother and daughter, neither of whom was aware of any further contact between Duncan and Deborah during the night.

The next morning, Deborah went outside to smoke a cigarette. While Deborah was on the front porch, Duncan got up. Antoinette told him "there is the door," indicating that he should leave. After he and Antoinette exchanged words, Duncan put on a jacket and walked out on the porch where Deborah was sitting, smoking a cigarette. Duncan stood behind Deborah for a few seconds and then stabbed her multiple times with a kitchen knife he had hidden in his jacket. When Carrieanne responded to her mother's screams, Duncan approached Carrieanne with the knife and asked, "You want it too?" Believing Duncan would stab her too, Carrieanne ran and hid in the closet.

When Antoinette asked a neighbor who had witnessed the attack to call 911 because her daughter had been stabbed, Duncan said, "Yeah, I did it on purpose. I'll sit here and wait for the cops." Duncan, who had thrown

> the knife on the ground, then waited until police arrived. Upon their arrival, Duncan told police, "I stabbed her." After being advised of his rights, Duncan told police that he and the victim had been arguing and that he remembered going outside and stabbing her twice. In a signed statement, Duncan wrote:
>
> I walked out the door with the knife and stabbed Debbie as she was sitting on the stoop. I think I stabbed her twice. I saw her go off with two guys last night she came home about 1:00 a.m. and I guess I went nuts.
>
> Deborah Bauer died two hours after the attack. The cause of death was a stab wound to the right chest. According to the medical examiner, the victim also had suffered two life threatening wounds to the back and three defensive wounds, one to each arm and one to her leg.

Id. at 280-81.

The trial court found one aggravating circumstance--Duncan had previously been convicted of a felony involving the use or threat of violence, namely the aggravated assault on Carrieanne Bauer and the second-degree murder of a fellow inmate in 1969. See id. at 281. In mitigation, the trial court considered the following fifteen mitigating factors urged by the defendant: (1) Duncan's childhood and upbringing saddled him with an emotional handicap; (2) Duncan's ability to conform his conduct to the requirements of the law was substantially

impaired at the time of the crime; (3) Duncan was under the influence of extreme mental or emotional disturbance at the time of the killing; (4) Duncan was under the influence of alcohol at the time of the killing; (5) the killing was not for financial gain; (6) the killing did not create a great risk of death to many persons; (7) the killing did not occur while Duncan was committing another crime; (8) the victim was not a stranger; (9) the victim was not a child; (10) Duncan was a good, dependable, and capable employee; (11) Duncan was a good listener and supportive friend; (12) Duncan had satisfactorily completed his parole and was discharged from parole; (13) Duncan confessed to the killing; (14) the killing came as a result of and subsequent to a domestic dispute; and (15) Deborah Bauer chose Donn Duncan to be her husband. See id.

On direct appeal, Duncan raised three issues related to the penalty phase of his trial. See id.[2] The issues raised by Duncan were: (1) the death sentence is disproportionate and constitutes cruel or unusual punishment; (2) it was reversible error to admit a gruesome photograph of the victim of the 1969 murder; and (3) the trial court erred in refusing to give numerous special jury instructions. See id. Additionally, the State cross-appealed the trial court's findings that (1) Duncan was under the influence of alcohol at the time of the murder; (2) Duncan was under the influence of extreme mental or emotional disturbance at the time of the murder; and (3) Duncan's ability to conform his conduct to the requirements of the law was substantially impaired. See id.

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[2] Duncan did not challenge his convictions. However, this Court held that the trial record contained competent, substantial evidence to support the convictions. See *Duncan*, 619 So. 2d at 281 n.1.

This Court summarily rejected Duncan's third claim, but with respect to his second claim, we agreed with Duncan that it was error for the trial court to allow the State to admit the challenged photograph because the prejudicial effect of the photo outweighed its probative value. See id. at 282. However, we determined that the error was harmless beyond a reasonable doubt considering that no further reference was made to the photo after it was introduced, it was not urged as a basis for a death recommendation, it was not made a focal point of the proceedings, and the jury was well aware of the fact that Duncan had previously been convicted of another murder. See id.

With respect to the three arguments raised on cross-appeal by the State, we agreed with the State that the mitigating factors of acting under the influence of alcohol and the two statutory mental health mitigators were not supported. See id. at 283 ("After a thorough review of the record, we agree with the State that the record is devoid of any evidence supporting the challenged circumstances."). We noted that the only evidence of Duncan's intoxication was the daughter's testimony that Duncan appeared to have been drinking when he returned home approximately eleven hours before the murder. See id. Further, no evidence was presented demonstrating an extreme mental or emotional disturbance or a mental disturbance that interfered with Duncan's knowledge of right and wrong. See id. The final issue addressed by this Court on direct appeal was Duncan's claim that the death penalty was disproportionate in his case. See id. at 284. We concluded that, compared to other capital cases, death was appropriate. See id.

Duncan subsequently filed a timely rule 3.850 motion, followed by five amendments, with the final amended motion raising twelve claims of error, including numerous subclaims.

In July 1998, the trial court held a *Huff*[3] hearing to determine whether an evidentiary hearing on any of Duncan's claims was warranted. The court determined that an evidentiary hearing was required to address several of the issues raised by Duncan, namely Duncan's claims of: (1) ineffective assistance of counsel during the guilt phase related to mental health issues and concession of guilt; (2) ineffective assistance of counsel at the penalty phase; and (3) counsel's alleged ineffectiveness as it related to mental health experts. The evidentiary hearing was held on December 14, 1999, and June 12-13, 2000.

The trial court ruled that all but one of Duncan's claims were either insufficiently pled, procedurally barred, or without merit; only Duncan's claim that counsel was ineffective for failing to introduce available mental health mitigation that could have led the jury to recommend a life sentence was meritorious. Specifically, the trial court concluded that based upon the testimony provided by Dr. Berland, Duncan's mental health expert, during the evidentiary hearing, "counsel knew or should have known of the existence of various mitigating factors that could have been presented during the penalty phase. The onus is therefore on the State to demonstrate that counsel had a valid strategic or tactical basis for declining to present those factors." Order Granting in Part and Denying in Part Fifth Amended Motion to Vacate Judgments of Conviction and Sentences at 16. Noting that Duncan's penalty phase trial counsel was not able to provide a specific reason as to why Dr. Berland was not called to testify, the trial court ruled that both the performance prong and prejudice prong of

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[3] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

the *Strickland*[4] test for ineffective assistance of counsel were satisfied. Therefore, the trial court held that Duncan was entitled to a new penalty phase proceeding. The State now appeals the trial court's grant of a new penalty phase. Further, Duncan cross-appeals, raising numerous claims.[5] Additionally, Duncan filed a petition for a writ of habeas corpus, asserting several claims.[6]

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[4] *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

[5] For ease of analysis, we have renumbered Duncan's numerous claims and subclaims raised in his cross-appeal. The ten claims asserted by Duncan are: (1) counsel was ineffective during the guilt phase for failing to investigate and present a voluntary intoxication defense; (2) counsel was ineffective during the guilt phase for conceding that Duncan was guilty of second-degree murder; (3) counsel was ineffective during the guilt phase for failing to object to the introduction and display of prejudicial photographs; (4) cumulatively, counsel's acts and omissions denied Duncan effective assistance of counsel during the guilt phase; (5) counsel's failure to introduce mitigating evidence of Duncan's good prison record during the penalty phase constituted ineffective assistance of counsel; (6) penalty phase counsel was ineffective for failing to challenge the prior violent felony aggravating factor by presenting evidence of the circumstances surrounding the 1969 murder; (7) cumulatively, counsel's acts and omissions denied Duncan effective assistance of counsel during the penalty phase; (8) the imposition of a sentence of death in the instant case is disproportionate, arbitrary, and disparate; (9) the rules prohibiting counsel from interviewing jurors violates Duncan's constitutional rights and deny him adequate assistance of counsel in pursuing his postconviction remedies; and (10) a combination of procedural and substantive errors deprived Duncan of a fundamentally fair capital trial and penalty phase guaranteed by the United States and Florida Constitutions.

[6] Again, we have renumbered the many claims and subclaims raised by Duncan in his habeas petition. The six claims argued are: (1) appellate counsel was ineffective for failing to raise an error based upon this Court's decision in *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990); (2) appellate counsel was ineffective for failing to raise the reversible error caused by the

STATE'S 3.850 APPEAL

Following the United States Supreme Court's decision in Strickland, this Court held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). Ineffective assistance of counsel claims present a mixed question of law and fact and, therefore, are subject to plenary review based upon the *Strickland* test. See id.; see also *Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999). Under this standard, this Court conducts an independent review of the

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introduction of improper evidence, namely double hearsay testimony; (3) appellate counsel was ineffective for failing to assert that Duncan's due process rights were violated when the State presented cumulative evidence of the crime by having a witness re-enact the murder using a dummy; (4) cumulatively, appellate counsel's errors resulted in prejudice to Duncan; (5) the death sentence here violates Duncan's rights under the United States Constitution because Duncan did not have a constitutional jury verdict on each element of the capital offense; and (6) the combination of procedural and substantive errors deprived Duncan of a fundamentally fair trial and direct appeal.

trial court's legal conclusions, while giving deference to the trial court's factual findings. See id.

There is a strong presumption that trial counsel's performance was effective. Strickland provides: "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689, and further: "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. The defendant alone carries the burden to overcome the presumption of effective assistance: "The defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689. The United States Supreme Court explained:

> A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690; see also *Asay v. State*, 769 So. 2d 974, 984 (Fla. 2000) ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial

strategy."). Finally, "judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689.

Initially, the State argues that the trial court shifted the burden from the defendant to the State to prove that counsel's performance was reasonable. After evaluating the postconviction evidentiary hearing testimony provided by Dr. Berland, the mental health expert presented by Duncan, the circuit court, in its order, wrote:

> Based on Dr. Berland's testimony, the Court finds that counsel knew or should have known of the existence of various mitigating factors that could have been presented during the penalty phase. The onus is therefore on the State to demonstrate that counsel had a valid strategic or tactical basis for declining to present those factors.

Order Granting in Part and Denying in Part Fifth Amended Motion to Vacate Judgments of Conviction and Sentences at 16 (emphasis added). The lower court further wrote:

> Simply asserting that something was done for unknown strategic reasons is not sufficient. An evidentiary hearing is held so that the Court may hear what the actual reason was, and may then determine whether that reason is consistent with professional standards. In the absence of a specific reason, the Court is constrained to find that the [sic] Mr. Duncan's allegation has satisfied the performance prong of Strickland.

Id. at 18. While the United States Supreme Court has unquestionably determined that the burden of persuasion is on the defendant to demonstrate ineffective assistance, see

Strickland, 466 U.S. at 689, we have held that "the failure to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." *Rose v. State*, 675 So. 2d 567, 571 (Fla. 1996).

If the trial court's order was understood as holding that Duncan is entitled to relief solely because his former attorney was unable to provide the court with a reason for his failure to call Dr. Berland to testify, then such a holding would be in error, as it would constitute improper burden shifting. Ineffective assistance of counsel is not proven, per se, merely because the attorney whose acts are being questioned cannot provide a justification for his actions. The United States Supreme Court has held, and we have recognized, that the burden is on the moving party to demonstrate that the two components of Strickland, namely that the acts or omissions of the lawyer were outside the broad range of reasonably competent performance and that the substantial deficiency so affected the proceeding that confidence in the outcome is undermined, have been satisfied. See *Strickland*, 466 U.S. at 690; *Asay*, 769 So. 2d at 984. Once the moving party has made the required showing, an objective basis for counsel's actions must be found, within the record, to justify counsel's performance and thereby rebut the moving party's claim. If the record itself does not provide such justification, then the court has no choice but to require the State, and the attorney whose performance is in question, to answer the moving party's allegations.

In the instant action, the trial court did not improperly shift the burden to the State to prove counsel was effective. A review of the court's order demonstrates that the trial court followed the proper procedure in determining that a new penalty phase is warranted. Initially, the court considered the evidence presented by Duncan, and determined that Duncan

had satisfied the demands of *Strickland*. Next, the court reviewed the record and held that the record, which included the testimony of Duncan's former attorney, did not provide the requisite justification for the attorney's performance, and therefore Duncan was entitled to a new penalty phase. Having reviewed the record and considered both parties' arguments on appeal, we hold that Duncan did satisfy the requirements of *Strickland*, and the record does not provide an objective basis to justify counsel's actions, and therefore the trial court properly granted Duncan a new penalty phase.

To satisfy the first requirement of *Strickland*, the deficiency prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Ragsdale v. State*, 798 So. 2d 713, 715 (Fla. 2001) (quoting *Strickland*, 466 U.S. at 688). The postconviction trial court ruled that Duncan had sufficiently demonstrated counsel's ineffectiveness. With respect to the issue of counsel's failure to present evidence regarding mental health mitigation, Duncan presented several witnesses during the postconviction evidentiary hearing. Most importantly, the court heard the testimony of Dr. Berland, the mental health expert originally hired by defense counsel at the time of the trial, but never called to testify on Duncan's behalf. According to Dr. Berland's testimony at the evidentiary hearing, he first became involved in Duncan's case in 1991. He interviewed Duncan twice, he conducted psychological testing on Duncan, and he interviewed three lay witnesses. Dr. Berland testified that it was his opinion, based on his evaluation, that Duncan suffered from a mental illness, specifically a chronic, long-lasting psychotic disturbance, and that there was evidence of delusional paranoid thinking. Further, Dr. Berland stated that he also had psychological testing that suggested brain injury, although he had no definitive history of brain injury. The lay witnesses contacted by Dr. Berland corroborated symptoms of

a psychotic disturbance and significant drug abuse. Dr. Berland explained that while he would have testified regarding Duncan's mental illness, it would have been better if he had been able to continue his evaluation by contacting more lay witnesses. However, he was convinced he had something substantial.

In our opinion on direct appeal, we held that "there was no evidence of extreme mental or emotional disturbance or of mental disturbance that interfered with Duncan's knowledge of right and wrong." *Duncan*, 619 So. 2d at 283. This lack of evidence caused us to hold that the trial court's consideration of the two mental health mitigating factors in determining the propriety of a death sentence was improper. See id. We note that proper consideration of the mitigating factors in this case is all the more important given the trial court's finding of only one aggravating factor. Clearly, as the trial court originally determined that the two mental health mitigating factors were supported, Duncan's penalty phase counsel must have attempted to argue in support of mental health mitigation. However, we held on direct appeal that he failed to present any evidence to support the two mitigating factors. As was made evident during the postconviction evidentiary hearing, Dr. Berland had evidence to support the mental health mitigators that was not presented. Unquestionably, had the available, substantial evidence been presented to support the two statutory mental health mitigating factors, the case is placed in an entirely different posture and our confidence in the penalty phase is undermined.

The trial judge presiding over the postconviction motion and evidentiary hearing determined that Dr. Berland was a credible witness who had available evidence that could have been presented. We agree. The doctor's testimony satisfies Duncan's burden of identifying particular omissions made by

his penalty phase counsel that were outside the broad range of reasonably competent performance. It was then the State's obligation to demonstrate, either through the trial record or the testimony of Duncan's trial counsel, a reasonable, objective justification for counsel's failure to present the available evidence of mental health mitigation.

Despite the trial court's statement, in its order, that "the Court can conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify," Order Granting in Part and Denying in Part Fifth Amended Motion to Vacate Judgments of Conviction and Sentences at 18, it is clear to us that the record is completely devoid of any justification for counsel's failure to present the available evidence. The trial court did not provide what it believed to be the "sound strategic and tactical reasons for deciding not to call Dr. Berland," nor can we ascertain from this record what those reasons may have been. When questioned during oral argument, the State's attorney could also not provide this Court with any such reasons. We again emphasize that our holding is not based solely upon Duncan's former attorney's failure to provide a justification for his actions. Instead, it is the complete absence in the record before us of any reason to support why the doctor was not called to testify on Duncan's behalf. Duncan, having satisfied his burden under *Strickland*, is entitled to a new penalty phase.

DUNCAN'S 3.850 CROSS-APPEAL

Having determined that Duncan is entitled to a new penalty phase as a result of the ineffectiveness of his penalty phase counsel in failing to present available evidence in support of mental health mitigation, it is unnecessary for us to address the claims raised by Duncan in his cross-appeal regarding additional errors that he asserts occurred during the penalty phase. Therefore, we decline to address claims five, six, seven,

and eight of Duncan's cross-appeal. With respect to claims one through four, which all pertain to alleged errors committed during the guilt phase, and claim nine regarding Duncan's inability to interview jurors, we hold that these claims are all without merit.[7] Finally, regarding Duncan's tenth claim--that a combination of procedural and substantive errors deprived Duncan of a fundamentally fair capital trial and penalty phase guaranteed by the United States and Florida Constitutions--a review of the postconviction record reveals this claim was raised for the first time in Duncan's first amended motion for postconviction relief. However, this issue was not raised in Duncan's fifth amended motion for postconviction relief, the motion specifically ruled upon by the circuit court, and therefore the trial court did not address this issue in its order. "It is this Court's job to review a circuit court's ruling on a rule 3.850 claim, not to decide the merits of that claim." *Thomas v. State*, 838 So. 2d 535, 539 (Fla. 2003). As this issue was neither raised nor decided below, it is procedurally barred.[8] n8

PETITION FOR WRIT OF HABEAS CORPUS

Claim 1: Failure to Raise a Nixon Error

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[7] Claim 1: see *Pietri v. State*, 885 So. 2d 245, 2004 Fla. LEXIS 1368, 29 Fla. L. Weekly S 440, S 441-42 (Fla. Aug. 26, 2004); see *Spencer v. State*, 842 So. 2d 52, 63 (Fla. 2003); claim 2: see *Jones v. State*, 845 So. 2d 55, 70-71 (Fla. 2003); claim 3: see *Philmore v. State*, 820 So. 2d 919, 930-31 (Fla. 2002); claim 4: see *Griffin v. State*, 866 So. 2d 1 (Fla. 2003); and claim 9: see *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000).

[8] Even if considered, this claim is meritless. "Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail." *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003); see also *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999).

Duncan's first claim in his habeas petition is wholly identical to the second claim raised in his cross-appeal, namely that trial counsel was ineffective during the guilt phase for conceding that Duncan was guilty of second-degree murder, save for the fact that Duncan is now arguing that his appellate counsel was ineffective for failing to raise the issue on direct appeal. This Court has held that the criteria for proving ineffective assistance of appellate counsel parallel the standard used for ineffectiveness of trial counsel claims. See *State v. Riechmann*, 777 So. 2d 342, 364 (Fla. 2000). Therefore, here, Duncan must demonstrate:

> (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. (quoting *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985)). As we denied Duncan's identical claim in his cross-appeal, we likewise conclude that the instant claim is without merit. Duncan's trial counsel made a strategic, tactical decision to address second-degree homicide in an attempt to save Duncan's life. Given the weight of the evidence against Duncan, including a confession and three eyewitnesses, trial counsel's strategy was not unreasonable. See *Jones*, 845 So. 2d at 70-71. Therefore, appellate counsel was not ineffective for failing to raise this issue on direct appeal.

Claim 2: Failure to Challenge the Introduction of Improper Evidence

In his second claim, Duncan challenges the following penalty phase testimony of one of the State's witnesses, Detective Nazarchuck:

> Q: (Prosecutor): In the course of your investigation, did you as a representative of law enforcement become aware that Carrieanne Bauer indicated Donn Duncan made certain statements right after or, you know, within minutes after Deborah Bauer's stabbing?
>
> A: (Detective Nazarchuck): Yes.
>
> Q: And those statements would be, would have included, "I hope you die"?

Before the witness could respond, defense counsel objected to the testimony. The following colloquy then occurred in a bench conference:

> Defense counsel: Although the rules of evidence are relaxed in this type of proceeding, I think we're going, the state is going beyond the bounds of proprietary; that witness testified in this matter, there was testimony of the statement that they were afraid. This is just once again repetitive, a rehash of testimony that's already been entered in this case.
>
> Prosecutor: I have - well, I don't know your, what your legal objection is. What's the legal objection?
>
> Defense counsel: I put it on the record, ma'am.
>
> Prosecutor: Impropriety? I am questioning this witness, and what I'm establishing is what Carrieanne Bauer told law enforcement

concerning the defendant's statements, there's actually a remarkable similarity to what he said in 1969, and after killing Willie Davis. That goes directly to - the defense is asking about whether or not he's, whether or not he has the ability to comprehend the criminality of his conduct. Both of these cases he clearly, he understood the criminality of the conduct. I'm establishing by identifying the statement, that is Carrieanne in no way could have had any idea what he said back in 1969; that he truly said those. The similarity, I want to establish they knew about the statements and they were recorded before law enforcement ever found the details of his case in Marion County.

Defense counsel: That doesn't -

Prosecutor: It makes it clear there was no hankey-panky about the similarity of the statements.

Defense counsel: That not [sic] does not address the issue of it being repetitive testimony which has already been presented.

Prosecutor: I am allowed to go into these things on the sentencing.

The Court: Okay.

Prosecutor: I have to have him identify what statements his testimony is going to be about.

The Court: Okay.

Defense counsel: The other thing, she was leading the witness.

Prosecutor: I can ask him to repeat the statements. I was just trying to move it along.

The Court: Sustain the object as to leading. As far as the other objection, repetitious is an objection in the discretion of the Court. I think the time lag between the testimony that was given at the trial and the purpose the prosecutor wants to introduce the statements, at this time I think it's appropriate. It would not be appropriate to sustain an objection based on that. So I'll overrule that objection.

The direct examination of the detective then continued:

Q (Prosecutor): Detective Nazarchuck, could you tell us the statements that Carrieanne Bauer was to advise you during the course of the investigation that Donn Duncan had made after the stabbing of her mother?

A (Detective Nazarchuck): Something to the effect, do you want some of this, of this, bitch. Then said I hope you die, bitch. I did this on purpose. I'll sit here and wait for the police.

Q: Now, at the time that you became aware of Carrieanne Bauer's testimony as to what Donn Duncan said and as to his exact words, did you, as far as, you know, or any local representative of law enforcement have any information as to the details of the old Marion County case?

A: I was not aware of any details until much later.

The State had no further questions, and defense counsel did not cross-examine the witness.

Essentially, Duncan is asserting two issues relating to the testimony of Detective Nazarchuck. First, Duncan maintains that the detective's testimony was impermissible double hearsay, as the State did not demonstrate that Carrieanne Bauer, who heard the statements made by Duncan, was unavailable to testify. Second, Duncan maintains that by allowing the detective to testify to Duncan's statements, the trial court permitted the State to present improper anticipatory rebuttal evidence of a mitigating circumstance, namely whether the defendant's ability to appreciate the criminality of his conduct was substantially impaired, for which no evidence had been or ever was presented. This anticipatory rebuttal allowed the State to present improper nonstatutory circumstances in aggravation. Duncan concludes that appellate counsel's failure to raise either of these claims on direct appeal constituted ineffective assistance.

This Court has held that "to be preserved for appeal, 'the specific ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.'" *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003) (quoting *Rodriguez v. State*, 609 So. 2d 493, 499 (Fla. 1992)). Further, we have also held that "appellate counsel cannot be considered ineffective under [*Strickland*] for failing to raise issues that are procedurally barred because they were not properly raised during the trial court proceedings and do not present a question of fundamental error." *Downs v. Moore*, 801 So. 2d 906, 910 (Fla. 2001). In *Knight v. State*, 746 So. 2d 423 (Fla. 1998), Knight argued that his Confrontation Clause rights were violated when a detective who testified during his capital sentencing proceeding recounted a prior witness's sworn statement. See id. at 429-30. There, we held: "Because Knight never specifically objected to [the detective's] testifying as to

the contents of the pilot's statement, we find this claim procedurally barred." Id. at 430.

In the instant case, defense counsel clearly objected to the State's line of questioning. However, the grounds raised for the objection were repetitiveness and leading; defense counsel did not object on the basis of double hearsay, anticipatory rebuttal, or the presentation of nonstatutory aggravation evidence. Pursuant to Spann, appellate counsel would only have been able to raise a claim on appeal, challenging the detective's testimony, based on one of the two grounds asserted during trial when defense counsel objected to the testimony. Duncan is now claiming appellate counsel was ineffective for failing to assert claims he was procedurally barred from bringing. As we held in Downs, appellate counsel could not have been ineffective for failing to raise issues that were procedurally barred.[9]

Claim 3: Failure to Challenge Reenactment of Murder by Witness

In *Brown v. State*, 550 So. 2d 527 (Fla. 1st DCA 1989), the First District Court of Appeal held:

> Demonstrative exhibits to aid the jury's understanding may be utilized when relevant to the issues in the case, but only if the exhibits constitute an accurate and reasonable reproduction of the object involved. The determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion.

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[9] Notably, Duncan has made no claim of fundamental error with respect to the detective's testimony.

Id. at 528 (citations omitted); see also *Harris v. State*, 843 So. 2d 856, 864 (Fla. 2003). The prosecutor in *Brown* used a knife and a Styrofoam head during his closing argument to depict the extent of a victim's stab wounds. See 550 So. 2d at 528. There, the Fifth District concluded that the demonstrative exhibits were "sufficiently accurate replicas to be allowable within the court's discretion." Id. The court also noted that the record contained overwhelming evidence of the defendant's guilt that negated any reasonable possibility that the defendant's conviction resulted from the challenged demonstration. See id. at 529. As no fundamental error or undue prejudice was shown, the decision to allow the use of the demonstrative exhibits was within the trial court's discretion. See id.

Similarly, in the instant case, it was within the trial court's discretion to allow the use of a dummy as a demonstrative aid during one eyewitness's testimony. Richard Ferguson was Deborah Bauer's neighbor at the time of the offense. He witnessed the attack and notified police. He was the last witness called by the State during the State's presentation of direct evidence, and after he detailed the attack, the prosecutor asked him to demonstrate what he had witnessed by utilizing a dummy. Defense counsel objected, arguing that the demonstration would be repetitive and inflammatory. The objection was overruled and the witness proceeded to demonstrate the attack, using himself in place of Duncan and the dummy as the victim.[10]

Duncan does not claim that the reenactment was inaccurate or not a reasonable reproduction of what occurred. He argues only that it was unnecessary to prove the State's case, and was repetitive in light of the three eyewitnesses' testimony and the

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[10] The record is silent regarding the appearance of the dummy used during the demonstration.

medical examiner's autopsy photographs that had been introduced earlier, and therefore its prejudicial impact far outweighed its probative value. He relies upon two cases, *Cave v. State*, 660 So. 2d 705 (Fla. 1995), and *Taylor v. State*, 640 So. 2d 1127 (Fla. 1st DCA 1994), to support his argument.

Duncan's reliance upon *Cave* and *Taylor* is misplaced. In *Cave*, this Court held that the use of a videotaped reenactment of the crime during resentencing was harmful error. See *Cave*, 660 So. 2d at 708-09. We held that, under those circumstances, where guilt was not at issue, the use of the video reenactment was irrelevant, cumulative, and unduly prejudicial. See id. In the instant case, the eyewitness reenacted the attack during the prosecution's case-in-chief, when guilt or innocence had yet to be decided. Therefore, *Cave* and the instant case are distinguishable.

In *Taylor*, the State used, as a surrogate victim, a young woman of the same height, weight, general features, and coloring as the victim. See *Taylor*, 640 So. 2d at 1132. Also, the court permitted the medical examiner to use clay heads to describe the impact and nature of the wounds that caused death. See id. The First District held that the use of both of these demonstrative aids was in error. See id. at 1134. Regarding the use of the clay heads, the court noted that there was no dispute as to the cause of death or the number of blows struck, and the feminine appearance of the heads was certain to evoke an emotional response in the minds of the jurors. See id. Further, the use of the exhibits had little or no bearing on the question for the jury, namely the issue of the defendant's sanity at the time of the offense. Similarly, the court held that the use of the surrogate victim had a tenuous relation to the relevant issue, and any probative value was outweighed by the prejudicial impact. See id. In the instant case, the relevant issue before the jury was whether Duncan was guilty of first-degree premeditated murder, and the demonstrative exhibit was

utilized to show Duncan's actions during the course of the attack. Further, Duncan has made no claim that the appearance of the dummy was altered to resemble the victim and thereby evoke a more emotional action from the members of the jury.

Here, the use of the demonstrative exhibit falls squarely into the standard outlined in *Brown*. The dummy was used to aid the jury's understanding of a relevant issue, namely guilt, and there is no claim that the exhibit was not an accurate and reasonable reproduction of the attack. Therefore, the determination as to whether to allow the use of a demonstrative exhibit was a matter within the trial court's discretion. The judge did not abuse his discretion in allowing the use of the demonstrative aid. Additionally, as in *Brown*, the overwhelming evidence of Duncan's guilt negates any reasonable possibility that his conviction resulted from the challenged demonstration. *Strickland* requires that Duncan show that counsel's performance was deficient and that the deficient performance resulted in prejudice to him. See *Strickland*, 466 U.S. at 687. Here, Duncan has failed to satisfy either prong. Duncan's claim is without merit, and appellate counsel was not ineffective for failing to raise a meritless claim. See *Johnson v. Singletary*, 695 So. 2d 263, 267 (Fla. 1996).

Claim 4: Cumulative Errors Resulted in Prejudice

Duncan's claim of cumulative error is without merit. As we have held that all of Duncan's individual claims are either procedurally barred or without merit, his cumulative claim must be denied. See *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003) ("Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail."); see also *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999).

Claim 5: Constitutionality of Florida's Death Penalty Statute

Duncan relies primarily on two cases to support his argument that Florida's death penalty statute is unconstitutional. In *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985), the United States Supreme Court held that the jury must be fully advised of the importance of its role, and neither comments nor instructions may minimize the jury's sense of responsibility for determining the appropriateness of death. See id. at 341. Duncan argues that the judge's instruction of "as you've been told, the final decision as to what punishment be [sic] imposed is the responsibility of the judge," violates the mandates of *Caldwell*. This argument is without merit. The judge's instruction is included in the standard jury instructions read prior to penalty phase jury deliberations. See Fla. Std. Jury Instr. (Crim.) 7.11. This Court has repeatedly held that "Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate *Caldwell*." *Sochor v. State*, 619 So. 2d 285, 291 (Fla. 1993); see also *Floyd v. State*, 850 So. 2d 383, 404 (Fla. 2002).

Further, Duncan relies upon the United States Supreme Court's recent decision in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), to support his claim that Florida's death penalty statute is unconstitutional. This Court recently addressed Duncan's contention that the Florida death penalty scheme is unconstitutional in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 154 L. Ed. 2d 564, 123 S. Ct. 662 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067, 154 L. Ed. 2d 556, 123 S. Ct. 657 (2002), and denied relief. Duncan is likewise not entitled to relief on this claim. Additionally, even if Ring was applicable in Florida, Duncan would not be entitled to relief pursuant to that decision. Recently, in *Doorbal v. State*, 837 So. 2d 940 (Fla.), *cert. denied*, 539 U.S. 962, 156 L. Ed. 2d 663, 123 S. Ct. 2647 (2003), we held, "Because [the prior violent

felonies] were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional." Id. at 963. As in Doorbal, the death penalty was constitutionally imposed upon Duncan in light of the fact that the trial court properly applied the prior violent felony aggravating factor.

Claim 6: Combination of Procedural and Substantive Errors Deprived Duncan of a Fundamentally Fair Trial and Direct Appeal

Duncan's final claim in his habeas petition is essentially a "kitchen sink" argument, in which Duncan is simply restating all the alleged errors that he previously claimed to have suffered during his trial and direct appeal. While he highlights that this Court held that it was error to admit a gruesome photograph of the 1969 murder victim during his penalty phase, we note that we held that error was harmless. See *Duncan*, 619 So. 2d at 282. Having concluded that Duncan is entitled to a new penalty phase as a result of the ineffectiveness of his penalty phase counsel in failing to introduce available evidence in support of mental health mitigation, and further that none of the remaining individual claims of ineffective assistance of trial and appellate counsel asserted in Duncan's 3.850 motion and habeas petition have merit, we hold that Duncan's claim of cumulative error must fail. "Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail." *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003); see also *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999).

CONCLUSION

In summary, we affirm the trial court's grant of a new penalty phase and denial of the remainder of the claims raised in Duncan's motion for postconviction relief, and further deny Duncan's petition for a writ of habeas corpus.

It is so ordered.

PARIENTE, C.J., and WELLS, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

ANSTEAD, J., concurs specially with an opinion.

ANSTEAD, J., specially concurring.

I concur fully in the majority opinion except for its discussion of the impact of the decision in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002).

DONN A. DUNCAN, Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA, Appellee/Cross-Appellant.

No. 78,630

Supreme Court of Florida

April 29, 1993

Rehearing Denied June 17, 1993.

PER CURIAM.

Donn A. Duncan, who stands convicted of first-degree murder, appeals his sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

On the morning of December 29, 1990, Donn A. Duncan murdered his fiancee, Deborah Bauer. At the time of the murder, Duncan was living with Deborah Bauer, Deborah's daughter, Carrieanne Bauer, and her mother, Antoinette Blakeley. During the evening hours of December 28, 1990, Deborah left the house apparently to go drinking. Duncan left a short time later. When Duncan returned home around 8:30 p.m., he told Antoinette that Deborah would not be home until later because she had gone off with a guy who was going to buy her beer because Duncan had refused to do so. Duncan also told Antoinette to ask Deborah to sleep on the couch because he did not want to argue with her and that he would be leaving

in the morning. Duncan then went into the bedroom, where he remained until the next morning.

When Deborah returned around 10:30 p.m., her mother told her not to go into the bedroom because Duncan did not want to be bothered. A short time later Deborah went into the bedroom to get some cigarettes but left the room after a couple of minutes. Neither Antoinette nor Carrieanne heard any arguing or fighting while Deborah was in the room. Deborah slept in the living room with her mother and daughter, neither of whom was aware of any further contact between Duncan and Deborah during the night.

The next morning, Deborah went outside to smoke a cigarette. While Deborah was on the front porch, Duncan got up. Antoinette told him "there is the door," indicating that he should leave. After he and Antoinette exchanged words, Duncan put on a jacket and walked out on the porch where Deborah was sitting, smoking a cigarette. Duncan stood behind Deborah for a few seconds and then stabbed her multiple times with a kitchen knife he had hidden in his jacket. When Carrieanne responded to her mother's screams, Duncan approached Carrieanne with the knife and asked, "You want it too?" Believing Duncan would stab her too, Carrieanne ran and hid in the closet.

When Antoinette asked a neighbor who had witnessed the attack to call 911 because her daughter had been stabbed, Duncan said, "Yeah, I did it on purpose. I'll sit here and wait for the cops." Duncan, who had thrown the knife on the ground, then waited until police arrived. Upon their arrival, Duncan told police, "I stabbed her." After being advised of his rights, Duncan told police that he and the victim had been arguing and that he remembered going outside and stabbing her twice. In a signed statement, Duncan wrote:

> I walked out the door with the knife and stabbed Debbie as she was sitting on the stoop. I think I stabbed her twice. I saw her go off with two guys last night she came home about 1:00 a.m. and I guess I went nuts.

Deborah Bauer died two hours after the attack. The cause of death was a stab wound to the right chest. According to the medical examiner, the victim also had suffered two life threatening wounds to the back and three defensive wounds, one to each arm and one to her leg.

Duncan was charged with and convicted of the first-degree murder of Deborah Bauer and aggravated assault on Carrieanne Bauer. He was sentenced to three and one-half years' imprisonment on the aggravated assault. In accordance with the jury's twelve-to-zero recommendation of death, the trial judge sentenced Duncan to death for the first-degree murder.

In aggravation, the trial court found that Duncan had previously been convicted of a felony involving the use or threat of violence--the aggravated assault on Carrieanne and the seconddegree murder of a fellow inmate in 1969. In mitigation, the trial court considered the following fifteen mitigating factors urged by the defendant: 1) Duncan's childhood and upbringing saddled him with an emotional handicap; 2) Duncan's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime; 3) Duncan was under the influence of extreme mental or emotional disturbance at the time of the killing; 4) the defendant was under the influence of alcohol at the time of the killing; 5) the killing was not for financial gain; 6) the killing did not create a great risk of death to many persons; 7) the killing did not occur while Duncan was committing another crime; 8) the victim was not a stranger; 9) the victim was not a child; 10) Duncan was a good, dependable, and capable

employee; 11) Duncan was a good listener and supportive friend; 12) Duncan had satisfactorily completed his parole and was discharged from parole; 13) Duncan confessed to the killing; 14) the killing came as a result of and subsequent to a domestic dispute; 15) Deborah Bauer chose Donn Duncan to be her husband.

All issues on appeal concern the sentencing phase of the trial[1]. Duncan raises the following claims: 1) his death sentence is disproportionate and is cruel or unusual punishment; 2) it was reversible error to admit a gruesome photograph of the victim of the 1969 murder; and 3) the trial court erred in refusing to give numerous special jury instructions. The State cross-appeals the trial court's findings that 1) Duncan was under the influence of alcohol at the time of the murder; 2) Duncan was under the influence of extreme mental or emotional disturbance at the time of the murder, section 921.141(6)(b), Florida Statutes (1989); and 3) Duncan's ability to conform his conduct to the requirements of the law was substantially impaired, section 921.141(6)(f), Florida Statutes (1989).

First, we address Duncan's second claim challenging the admission of an extremely gruesome photograph that depicts gaping wounds to the prior victim's head and face. Prior to the commencement of the penalty phase, the defense filed a motion in limine to prevent the State from presenting evidence of the facts and circumstances of Duncan's 1969 conviction of second-degree murder. The motion was denied; however, the court withheld ruling on the admission of the photograph of the prior victim until after the State presented other evidence of the circumstances of the crime.

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[1] Duncan does not appeal his convictions; however, our review of the record reveals substantial competent evidence to support the convictions.

After a certified copy of the judgment and sentence for second-degree murder was entered into evidence, the State presented the testimony of Captain Martin Stephens, the chief investigator of the 1969 murder. Captain Stephens, who saw the victim in the emergency room soon after the attack, testified concerning the injuries sustained by the prior victim. He explained that the victim was severely cut about the face and head.

Captain Stephens then testified in detail concerning the circumstances of the prior murder.[2] Much of this testimony was offered to show the similarity between the 1969 murder and the murder of Deborah Bauer in an attempt to rebut Duncan's assertion of mental mitigation. The State then introduced, over objection, the photograph of the injuries sustained by the prior victim. The trial court allowed the photograph to be introduced to show the force required to cause the injuries described by the investigator and to show the position of the victim when the attack occurred.

In *Rhodes v. State*, 547 So. 2d 1201, 1204-05 (Fla. 1989), we noted that evidence concerning the circumstances of a prior felony conviction involving the use or threat of violence is

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[2] Captain Stephens explained that during an interview Duncan told him that the victim, a fellow inmate named Willie Davis, had been threatening him. After Davis called Duncan "a white cracker" and told him he was going to "get him," Duncan decided to kill Davis. The next morning, Duncan stole a bush axe from the maintenance shop. Duncan sawed off the handle of the axe and hid it in his jacket. He then went into the restroom where Davis was sitting on the commode and struck him three times in the head with the axe. As Duncan left the restroom, he told a fellow inmate who heard the attack, "Let that be a lesson to everybody, you can only push a man so far and that's what happens to you." Duncan then laid the bush axe down and walked to the control room and told the classifications officer that he had just killed a man.

admissible during the penalty phase of a capital trial. However, we cautioned that there are limits on the admissibility of such evidence. We emphasized that "the line must be drawn when [evidence of the circumstances of the prior offense] is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value." Id. at 1205.

We agree with Duncan that the prejudicial effect of this gruesome photograph clearly outweighed its probative value. § 90.403, Fla. Stat. (1991). The photograph did not directly relate to the murder of Deborah Bauer but rather depicted the extensive injuries suffered by the victim of a totally unrelated crime. Moreover, the photograph was in no way necessary to support the aggravating factor of conviction of a prior violent felony. A certified copy of the judgment and sentence for second-degree murder indicating that Duncan pled guilty to and was convicted of a violent felony had been introduced. As explained above, there was also extensive testimony from Captain Stephens explaining the circumstances of the prior murder and the nature of the injuries inflicted.

Although we agree that it was error to admit the challenged photograph, we find the error harmless beyond a reasonable doubt. *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). Once admitted, no further reference was made to the photograph. It was not urged as a basis for a death recommendation; nor was it otherwise made a focal point of the proceedings. Moreover, the jury was well aware of the fact that Duncan had previously been convicted of the brutal attack and murder of another.

We find no merit to Duncan's third claim concerning the trial court's refusal to give numerous requested special instructions. Prior to addressing Duncan's proportionality claim, we find it necessary to address the State's claims on cross-appeal.

In its cross-appeal, the State contends that the mitigating factor of acting under the influence of alcohol and the two statutory mental mitigating circumstances were not established in this case. Although a mitigating circumstance need not be proved beyond a reasonable doubt, it must be "reasonably established by the greater weight of the evidence." *Nibert v. State*, 574 So. 2d 1059, 1061 (Fla. 1990) (quoting *Campbell v. State*, 571 So. 415, 419 (Fla. 1990)). A trial court's findings concerning mitigation will not be disturbed if the findings are supported by "sufficient competent evidence in the record." *Campbell*, 571 So. at 420; see also *Nibert*, 574 So. 2d at 1062. However, after a thorough review of the record, we agree with the State that the record is devoid of any evidence supporting the challenged circumstances.

As noted by the trial court in its sentencing order, "all witnesses testified that the Defendant appeared sober and that no one observed him drink any alcoholic beverages since the night before." In light of this finding of fact, which is supported by the record, it is unclear whether the trial court actually found that Duncan was under the influence of alcohol at the time of the murder or whether the trial court was merely reciting the mitigating circumstance as proposed by the defendant. See *Campbell*, 571 So. 2d at 419 (sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by defendant).

The sentencing court stated in its written order that the challenged mitigating circumstances "are based on testimony from the guilt phase of the trial." However, according to the testimony of the victim's daughter and mother, Duncan left the house twice the evening preceding the murder, ultimately returning around 8:30 p.m. After telling Antoinette to ask Deborah to sleep on the couch, Duncan went to the bedroom where he remained until the next morning. Carrieanne stated

that when Duncan returned home the evening before the murder he appeared to have been drinking. However, neither Antoinette nor Carrieanne saw Duncan drink any alcoholic beverages the night before or the morning of the murder. Antoinette testified that Duncan did not appear to have been drinking the morning of the murder. The crime scene technician found no evidence of alcoholic beverages in Duncan's room. Antoinette testified that there were no alcoholic beverages elsewhere in the house. The deputies who reported to the scene on the morning of the stabbing testified that there was no evidence that Duncan was intoxicated.

The only evidence of Duncan's intoxication was Carrieanne's testimony that Duncan appeared to have been drinking when he returned home at approximately 8:30 p.m. the night before the murder. That testimony, standing alone, is insufficient to support a finding that Duncan was intoxicated at the time of the stabbing, some eleven hours later at 7:30 a.m. We cannot agree with Duncan's contention that the fact that the victim had a blood alcohol level of .143 at the time of her admission to the hospital around 8:00 a.m. somehow serves as evidence that he was intoxicated at the time of the stabbing.

We also agree with the State that there was no evidence to support the statutory mental mitigating factors urged by the defendant. In *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), we explained that extreme mental or emotional disturbance as used in section 921.141(6)(b), is interpreted as "less than insanity but more than the emotions of an average man, however inflamed." We went on to explain that substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, as used in section 921.141(6)(f), refers to mental disturbance that "interferes with but does not obviate the defendant's knowledge of right and wrong." Id.

There was no evidence of extreme mental or emotional disturbance or of mental disturbance that interfered with Duncan's knowledge of right and wrong. The only evidence of Duncan's mental state at the time of the murder is testimony concerning Duncan's actions prior to and after the murder and statements made by Duncan to police. Other than Duncan's statements to police, there was no evidence that Duncan "went nuts" prior to the stabbing. In the absence of any evidence of mental or emotional disturbance, Duncan's statements to police that he "went nuts" after arguing with the victim are insufficient to establish the existence of the mental mitigation urged. See *Robinson v. State*, 574 So. 2d 108, 111 (Fla. 1991) (in the absence of any evidence of intoxication at the time of crime, defendant's hearsay statement to doctor that he was intoxicated during offense was insufficient to establish mitigating circumstance of intoxication), *cert. denied*, 112 S. Ct. 131, 116 L. Ed. 2d 99 (1991).

Finally, we reject Duncan's claim that death is not proportionately warranted in this case. As noted above, the mitigating factor of under the influence of alcohol and the two statutory mental mitigators were not established in this case. Therefore, the cases cited in which the defendant was intoxicated, suffering from drug or alcohol addiction, or suffering from extreme mental or emotional disturbance at the time of the murder are distinguishable. See e.g., *Penn v. State*, 574 So. 2d 1079 (Fla. 1991); *Songer v. State*, 544 So. 2d 1010 (Fla. 1989); *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988); *Ross v. State*, 474 So. 2d 1170 (Fla. 1985). Moreover, the cases cited by Duncan do not involve a defendant who previously had been convicted of murder. Comparing the circumstances of this case with those of other capital cases, we conclude that death is appropriate. See e.g., *Lemon v. State*, 456 So. 2d 885 (Fla. 1984) (death proportionately warranted for defendant who killed a women with whom he had a relationship after a

previous conviction for a similar violent offense), *cert. denied*, 469 U.S. 1230, 105 S. Ct. 1233, 84 L. Ed. 2d 370 (1985).

Accordingly, having found no reversible error, we affirm the convictions and sentences.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, GRIMES and HARDING, JJ., concur.

KOGAN, J., concurs in part and dissents in part with an opinion in which SHAW, J., concurs.

KOGAN, J., concurring in part and dissenting in part.

I concur in all portions of the majority opinion except that portion finding the erroneous admission of the photograph of the prior murder victim harmless and that portion addressing Duncan's proportionality claim.

The challenged photograph depicted the gaping wounds to Willie Davis' head and face. Most notably, it showed the victim's nose, from just below his eyes to his upper lip, hanging away from his face. As noted by the majority, prior to the admission of the photograph, Captain Stephens had described these injuries in graphic detail. Thus, there is no question that the probative value of the challenged photograph was at best slight in comparison with its potential for inflaming the jury and thereby impermissibly affecting the jury's sentencing recommendation.

We recently cautioned trial judges to carefully scrutinize photographic evidence for prejudicial effect, particularly when less graphic evidence is available to illustrate the same point. *Marshall v. State*, 604 So. 2d 799, 804 (Fla. 1992). We have also cautioned against admission of extremely gruesome photographs which have little or no relevance. *Czubak v. State*,

570 So. 2d 925, 929 (Fla. 1990). Such caution is particularly warranted in cases such as this where the challenged photograph is of the victim of an unrelated prior offense. When a gruesome photograph is erroneously admitted under such circumstances, its admission likely will be harmful. See *Henry v. State*, 574 So. 2d 73, 75 (Fla. 1991) (photograph of victim of collateral crime was so inflammatory that it could have unfairly prejudiced the jury).

After viewing the challenged photograph in this case, I cannot agree that simply because no further reference was made to the photograph it did not become a focal point in the sentencing proceedings. The photograph is so inflammatory that I cannot say beyond an reasonable doubt that it did not contribute to the jury's recommendation. *State v. Diguilio*, 491 So. 2d 1129, 1138 (Fla. 1986). Because I believe the admission of the challenged photograph was harmful, I would vacate the sentence of death and remand for a new sentencing hearing before a newly empaneled jury and would decline to address Duncan's proportionality claim at this time.

SHAW, J., concurs.